Yew Kin Eng v Thew Beng Soon

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO 33-32-95
ZALEHA ZAHARI J
21 MARCH 1996

Family Law *— Marriage — Solemnization of — Marriage before the coming into force of the Law Reform (Marriage and Divorce) Act 1976 — Bare averment of the alleged marriage — Mere allegation that parties went for a 'honeymoon' — No explanation of nature of the solemnization ceremony or celebration — Whether there was any evidence of the parties having undergone some form of ceremony, celebration or proclamation that a marriage had in fact taken place — Whether there was a valid marriage — Law Reform (Marriage and Divorce) Act 1976 s 4*

The petitioner filed a divorce petition against the respondent. In her affidavit, the petitioner alleged that she was married to the respondent on or about May 1990 and that the marriage was celebrated by way of a honeymoon. She further claimed to have lived with the respondent for 14 years and had three children by him. The court, upon consideration of the documents before it — and upon hearing the submissions of counsel for the petitioner and the petition being uncontested — pronounced decree nisi, to be made absolute after the expiration of three months.

Six months after the pronouncement of the decree nisi, the respondent applied for an order that the decree nisi be set aside or revoked and a further order that the divorce petition be struck out with costs. The respondent contended that the decree nisi was a nullity since there was no marriage for the court to dissolve. This was because, according to the respondent, there was no solemnization of marriage as prescribed by the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The issue before the court was whether there was any evidence of the parties having undergone some form of ceremony, celebration or proclamation that a marriage had in fact taken place.

Held, allowing the application:

The alleged marriage took place prior to the coming into force of the Act. In respect of such marriages, the Act provides that a spouse whose marriage is rendered valid pursuant to s 4 of the Act could petition for divorce. Section 4 has clearly prescribed a marriage as valid only in circumstances where the parties had, prior to that date, undergone some form of solemnization of marriage pursuant to any 'law, religion, custom or usage'.

In this case, there was but a bare averment of the alleged marriage in the petition. In the face of the challenge by the respondent that he had not undergone any form of ceremonial marriage rites, the petitioner could not and did not show that such a solemnization ceremony had in fact taken place. To merely state that they went for

a 'honeymoon' — without elaborating on the nature of the solemnization ceremony or celebration the parties went through such that the petitioner considered herself to be 'married', which was to have been followed by the 'honeymoon' — was insufficient. A

In the absence of such evidence, the parties in this case had not acquired by law a marriage which was deemed valid and upon which the court was conferred with jurisdiction to dissolve. Consequently, the decree nisi was accordingly a nullity and had to be set aside, and the petition be struck out (see pp 4I, 5I and 6A–B). B

[Bahasa Malaysia summary

Pempetisyen telah memfailkan petisyen perceraian terhadap penentang. Dalam afidavitnya, pempetisyen telah mengatakan bahawa beliau telah berkahwin dengan penentang pada atau sekitar Mei 1990 dan perkahwinan itu telah diraikan dengan cara berbulan madu. Beliau selanjutnya mengatakan bahawa beliau telah tinggal bersama penentang selama 14 tahun dan mempunyai tiga orang anak dengan penentang. Mahkamah, setelah menimbangkan dokumen-dokumen di hadapannya — dan setelah mendengar penghujahan peguam untuk pempetisyen dan petisyen itu tidak dipertikaikan — mengumumkan dekri nisi, yang akan dijadikan muktamad selepas tamat tempoh tiga bulan. C D E

Enam bulan selepas pengumuman dekri nisi itu, penentang memohon untuk suatu perintah bahawa dekri nisi itu diketepikan atau dibatalkan dan perintah selanjutnya bahawa petisyen perceraian dibatalkan dengan kos. Penentang menghujahkan bahawa dekri nisi itu adalah suatu pembatalan kerana tidak ada perkahwinan untuk dibubarkan oleh mahkamah. Ini adalah kerana, menurut penentang, tidak ada upacara melangsungkan perkahwinan seperti yang ditetapkan oleh Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut'). Isu di hadapan mahkamah adalah sama ada terdapat apa-apa bukti bahawa pihak-pihak telah menjalani suatu bentuk upacara, keraian atau perisytiharan bahawa perkahwinan telah pada hakikatnya berlaku. F G

Diputuskan, membenarkan permohonan:

Perkahwinan yang dikatakan telah berlaku sebelum Akta tersebut berkuatkuasa. Berkenaan dengan perkahwinan yang sedemikian, Akta tersebut memperuntukkan bahawa suami/isteri yang mana perkahwinannya telah dijadikan sah mengikut s 4 Akta tersebut boleh memfailkan petisyen untuk perceraian. Seksyen 4 dengan jelasnya menetapkan sesuatu perkahwinan sebagai sah hanya dalam keadaan di mana pihak-pihak telah, sebelum tarikh itu, menjalani suatu bentuk upacara melangsungkan perkahwinan mengikut mana-mana 'undang-undang, agama, adat resam atau kelaziman'. H I

Dalam kes ini, hanya terdapat penegasan tentang perkahwinan yang dikatakan dalam petisyen. Berhadapan dengan cabaran oleh

penentang bahawa beliau tidak menjalani apa-apa bentuk upacara perkahwinan, pempetisyen tidak boleh dan tidak menunjukkan bahawa upacara sedemikian telah sebenarnya berlaku. Hanya dengan menyatakan bahawa mereka telah pergi 'berbulan madu' — tanpa keterangan yang lebih lanjut berkenaan dengan bentuk upacara pelangsungan perkahwinan atau keraian yang telah dijalani oleh pihak-pihak yang membuatkan pempetisyen menganggap dirinya sebagai 'berkahwin', yang mana akan diikuti dengan 'bulan madu' itu — adalah tidak memadai.

Dalam ketiadaan bukti yang sedemikian, pihak-pihak dalam kes ini telah tidak memperolehi dari undang-undang suatu perkahwinan yang dianggap sah dan di mana mahkamah dikurniakan bidang kuasa untuk membubarkan. Akibatnya, dekri nisi itu adalah dengan itu suatu pembatalan dan perlu diketepikan, dan petisyen itu dibatalkan (lihat ms 4I, 5I dan 6A–B).]

Notes

For cases on marriage, see 7 *Malall's Digest* (4th Ed, 1995 Reissue) paras 2066–2120.

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 4, 106

J Rajaratnam (*Lim Jaya & Co*) for the petitioner.
Saran Singh (*Saran Singh & Co*) for the respondent.

Zaleha Zahari J: This is an application by Thew Beng Soon ('the respondent') for an order that the decree nisi dated 5 April 1995 issued by the court pursuant to a divorce petition filed on 5 January 1995 by Yew Kin Eng ('the petitioner') be set aside or revoked and for a further order that the divorce petition filed be struck out with costs.

The background to this application is as follows.

On the date of the hearing of the divorce petition, ie 5 April 1995, the petitioner was then represented by En YH Chan whilst the respondent was absent. The court was informed that all relevant documents had been served on the respondent. The affidavit of Kok Chee Meng affirmed on 21 March 1995 filed on 24 March 1995 (encl 11) was referred to the court's attention.

Vide para 3 of the affidavit, the court took notice that the petition had been served personally on the respondent on 24 February 1995 and that the respondent had duly acknowledged service of the same. Vide para 4 of the same affidavit, the court also took notice that copies of the documents specified in the said paragraph, ie 'Notice of Proceedings' dated 13 January 1995, 'Statement as to Arrangements for Children', 'Acknowledgement of Service' and 'Affidavit by Petitioner in Support of Petition' had been served on the respondent on 28 February 1995.

According to the court's record, on the date of the hearing, the respondent did not file any application of intention to defend. He failed to

respond to the allegations made in the petition. He did not file any document showing that he was disputing any of the facts alleged in the petition. The petition, therefore, appeared to be uncontested.

According to paras 1 and 2 of the petition, the petitioner stated that:

1 On or about May 1980, the petitioner was married to the respondent, Thew Beng Soon at Kuala Lumpur. The marriage was celebrated by way of a honeymoon of a week's duration in Singapore.

2 The petitioner and the respondent have cohabited as husband and wife at Setapak, Kuala Lumpur from May 1980 and at No 22 Jalan SJ 16B, Taman Selayang Bahagia, Batu Caves, 68100 Selangor until the date hereof.

The birth certificates of the three children (exh YKE-1) were annexed to the petition. The respondent was named as the father in each of these birth certificates. There was also a certificate dated 25 November 1994 from the marriage tribunal pursuant to s 106 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act') certifying that attempts at reconciliation held on 17 June, 23 September and 25 November 1994 had failed. The petitioner contended that the marriage had broken down irretrievably and accordingly prayed that the marriage be dissolved and also prayed for several ancillary orders.

The court, upon consideration of the documents before it then — and upon hearing the submissions of counsel for the petitioner and the petition being uncontested — made an order in terms of prayers (a) and (b) of the petition and pronounced decree nisi, to be made absolute after the expiration of three months. With regard to the ancillary orders prayed for, no order was made on that date. The parties were, however, given liberty to apply.

Six months after the pronouncement of the decree nisi, ie on 3 November 1995, the respondent filed this application. A very short affidavit affirmed on 24 October 1995 was filed in support. The respondent contended that the decree nisi issued on 5 April 1995 was a nullity. According to him there was no subsisting marriage for the court to dissolve; that he had not undergone any marriage ceremony in accordance with Chinese rites. The respondent averred that going for a 'honeymoon' was not a marriage custom.

The petitioner's response (encl 44) highlighted the fact of her having lived with the respondent as man and wife for 14 years, having had three children by him and stressed the fact of the respondent being named as the father of the children on all of the children's birth certificates. On the 'honeymoon' issue, the petitioner's reply was that a couple would only go on a honeymoon subsequent to a marriage.

The Act came into force on 1 March 1982. This case relates to a marriage which is alleged to have taken place in May 1980, ie prior to the coming into force of the Act. In respect of such marriages, the Act provides that a spouse whose marriage is rendered valid pursuant to s 4 of the Act can petition for divorce. Section 4 of the Act states:

(1) Nothing in this Act shall affect the validity of any marriage solemnized under any law, religion, custom or usage prior to the appointed date.

A (2) Such marriage, if valid under the law, religion, custom or usage under which it was solemnized, shall be deemed to be registered under this Act.

(3) Every such marriage, unless void under the law, religion, custom or usage under which it was solemnized, shall continue until dissolved —

(a) by the death of one of the parties; or

B (b) by order of court of competent jurisdiction; or

(c) by a decree of nullity made by a court of competent jurisdiction.

In making my decision on this application, I note that para 1 of the petition filed is in very general terms. No marriage certificate was however appended. The petitioner averred that she was married to the respondent C at Kuala Lumpur in or about May 1980. No specific date was given as to when the marriage took place. The petitioner also did not elaborate on the form or manner in which the marriage was performed. The petitioner then went on to refer to a week's honeymoon in Singapore.

Encik Saran, counsel for the respondent, submitted that for a marriage D to be considered valid pre-1 March 1983, there must be evidence of some form of solemnization under any 'law, religion, custom or usage'. The respondent has categorically denied having undergone any form of marriage ceremony. He submitted that in the absence of some evidence presented before this court of such a marriage having been solemnized, there was no valid marriage for the court to dissolve. The decree nisi of 5 April 1995 E was therefore a nullity and should accordingly be set aside.

The word 'solemnize' is defined in the *Shorter Oxford English Dictionary* as follows:

1 to dignify or honour by ceremonies; to celebrate with special formality;

F 2 to celebrate (a marriage) with proper ceremonies and in due form; also to perform the ceremony of (marriage); and

3 to hold, observe, perform, proclaim, etc with some form of ceremony or formality; ... .

In respect of pre-1 March 1982 marriages, the legislature has clearly G prescribed a marriage as valid only in circumstances where the parties had, prior to that date, undergone some form of solemnization of marriage pursuant to any 'law, religion, custom or usage'. The sole issue before me therefore was whether there was any evidence before the court of the parties having undergone some form of ceremony, celebration or proclamation that a marriage had in fact taken place.

H

I could find none. There was but the bare averment in para 1 of the petition. In the face of the challenge by the respondent that he had not undergone any form of ceremonial marriage rites, the petitioner could not and did not show that such a solemnization ceremony had in fact taken place; eg being of the Chinese race, participating in a tea ceremony, the I holding of a wedding dinner or the production of a wedding photograph. To merely state that they went for a 'honeymoon' — without elaborating on the nature of the solemnization ceremony or celebration the parties went through such that the petitioner considered herself to be 'married', which was to have been followed by the 'honeymoon' — is, in my view, insufficient.

In the absence of such evidence, I therefore hold that the parties in this case had not acquired by law a marriage which is deemed valid and upon which this court is conferred with jurisdiction to dissolve. Consequently, the decree nisi issued on 5 April 1995 was accordingly a nullity. In exercise of my inherent jurisdiction, I accordingly ordered that it be set aside and the petition be struck out. Each party was ordered to bear their own costs.

Order accordingly.

Reported by Zahid Taib